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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW AND AS ADMINISTRATRIX, ETC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

This case is the companion case with Sarah Elizabeth Stringfellow, a Widow, Petitioner, versus Atlantic Coast Line Railroad Company, a Corporation, Respondent, No. 71, and as we understand it will be heard on the same record and at the same time. Therefore what we have had to say in our Brief on the Merits in Case No. 71 will be equally applicable here, both as to Statement of the Case and Argument, except that we deem that the following statement of the case should be made in correcting what we consider certain inaccuracies in the Statement by Petitioner in its Brief under the heading:

Material Facts.

Undisputed Facts.

The Undisputed Facts set out in Petitioner's Brief are correct except it is uncertain whether Stringfellow stopped or slackened up before attempting to cross the track (R. 73, 74, 86, 87), and it is certain that he "looked south, then north:" (R. 73), and that when he first saw the train he was on the tracks (R. 79). It is uncertain where the witness, Mrs. Sealy, was standing, because on R. 72 she says she was 90 feet from the crossing on the north side of Scotland Street, and on R. 74, on cross-examination, she does not deny that she was "waiting at the *crossing* for the train to pass," and on R. 73, on cross-examination, she does not deny saying to the witness, Mrs. Smart, about 10 or 15 minutes after the accident: "I thought Mr. Stringfellow saw the train, he drove up pretty close to the tracks and almost stopped, looked south and then north and then speeded ahead to cross. I thought Mr. Stringfellow saw the train, but undoubtedly he did not." In addition to these inconsistencies in her testimony, her testimony was impeached by two witnesses (R. 86, 87). It is also certain that the train was not scheduled to stop at Dunedin on the afternoon of the accident (R. 85), and was running late (R. 60, 67), in the teeth of a strong wind which interfered with a person using the street intersection in hearing the noise of an approaching train or any warning signals of its approach (R. 60, 74).

Disputed Facts.

Speed:

The statement in Petitioner's Brief is correct as to conflicts in the testimony as to speed of the train except that respondent's witnesses testified to a speed from 35 to 50

miles an hour, of the train at the point of the accident (R. 56, 57, 59, 87).

Warning Signals:

Only one of respondent's witnesses testified to hearing a whistle blow and the whistle heard at that time was:

> "the big whistle when it blew at Sunset Point, a mile or mile and a half from town. • • • I heard the smaller whistle two or three times after the big whistle. When the air whistle blew, the train was this side of the Water Tank. South of Albert Street, two or three streets cross the railroad. Between Albert Street and where the wreck took place on Scotland Street, I did not hear any whistle blow or bell ring" (R. 59).

Vision:

Conflict in the testimony as to vision is correctly stated by petitioner, except there was no conflict that at 15 feet, 8 inches, from the main line the view to the south was open and unobstructed.

ARGUMENT.

Petitioner takes the position that under the opinion of the circuit court of appeals, the court held that the father's negligence was the sole proximate cause of the injury of himself and children. On the contrary, the opinion of the court below will justify no such conclusion. The court did hold that the father and the railroad company were concurrently negligent and that the father's negligence could not be imputed to his children unless his negligence was the *sole* proximate cause of their deaths. *S. A. L. Ry. Co.* v. *Watson*, 94 Fla. 571, 113 So. 716; *Covington* v. *S. A. L. Ry. Co.*, 99 Fla. 1102, 128 So. 426; *Little v. Hackett*, 116 U. S. 366, 6 S. Ct. 391. It is upon this conclusion or holding of "*combined or concurrent negligence of their father and*

the railroad company" (R. 96) that petitioner in case No. 71 submits that the court erred in not remanding case No. 71 to the district court for a trial before a jury upon the conflicting evidence, along with the cases involved in this Petition, No. 95. That there was evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the injury and death of respondent's husband and children is set out in our brief in case No. 71. What the circuit court of appeals did hold was (R. 96):

> "There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run a train through a populous community without warning, or at a speed so great it could not be stopped within less than 100 yards; especially if because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south."

There can be no doubt from the court's language: (R. 96)

> "the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company;"

Certainly it cannot be said from this statement that the court held that the father was solely responsible or solely negligent. And on R. 97 the court said:

> "it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was

racing with the train in an attempt to pass ahead of it over the crossing."

It would seem that the case of *S. A. L. Ry. Co.* v. *Watson*, 94 Fla. 571, 113 So. 716, cited by the court to sustain its view, conclusively establishes the findings of the court that both the father and the railroad company were negligent. The opinion quotes from the Watson case: (R. 97)

> "There may be concurrent causes of a single injury —concurrent negligence of two separate and distinct agencies—which, operating contemporaneously, together constitute the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done."

And on R. 98:

> "Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the deaths of her children."

It necessarily follows from these findings and the conflict in the evidence, that the circuit court of appeals was completely justified and correct in remanding the cases involved in this petition to the district court for submission to a jury upon the issues of fact.

The Applicable Law.

Under this heading petitioner in its brief implies that respondent upon the trial of this case relied upon a presumption of negligence cast upon the railroad company by mere proof of the injuries alleged. It does not appear from the record in this case that the respondent upon the trial relied upon any presumption of negligence cast upon the railroad company by Section 7051, C. G. L. of Florida, 1927, in proving her case, and consequently the authorities cited

under this section of petitioner's brief are not applicable. There is no dispute as to the effect of this statute. Whatever presumption there was, was at an end upon the defendant railroad company introducing any evidence tending to show that its agents and employees had "exercised all ordinary and reasonable care and diligence" (Section 7051, *supra*).

Seaboard Air Line Ry. Co. v. *Thompson*, 57 Fla. 155, 48 So. 750;

Seaboard Air Line Ry. Co. v. *Watson*, 103 Fla. 477, 137 So. 719, 723, 287 U. S. 86, 77 L. Ed. 68;

Mobile, J. & K. C. R. Co. v. *Turnipseed*, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78;

Western & Atlantic R. Co. v. *Henderson*, 279 U. S. 639, 49 S. Ct. 455, 73 L. Ed. 884.

Independent of the presumption, the respondent introduced evidence upon her case in chief which was sufficient to establish negligence upon the part of petitioner and that such negligence was the proximate cause of the injury. Otherwise credence must only be given to the testimony of the petitioner, and that of respondent ignored; which was exactly what the trial court did and for which reason the circuit court of appeals reversed this case (R. 96-98). The "so-called presumption statute" is not involved in this case, insofar as the "presumption" is concerned. What is involved, *is whether the trial court in the light of the Florida decisions and in spite of the conflict in the evidence, had the right to disregard the Florida decisions and disregard respondent's right to a trial by jury and decide the case himself, upon evidence which the circuit court of appeals found to be "in hopeless conflict"* (R. 94), and which the circuit court of appeals very properly held was a question *"for the jury, not the court"* (R. 96).

Was the circuit court of appeals correct in sending this case back to be submitted to a jury?

It is submitted that the state of the evidence required that the issues of fact raised upon conflicting testimony "shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative."

Walker v. *New Mexico R. Co.*, 165 U. S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837.

It was said by this Court in *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364, that in no instance may the judge find the facts for the jury, and that while he may set the verdict aside, if he does so another trial by jury must follow. In that case the court said:

> "It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the duty, even to the extent of directing their verdict when the insufficiency or conclusive character of the evidence warrants such a discretion, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact."

In our brief in case No. 71, we have pointed out that under the Florida decisions, the jury might, from the evidence introduced, reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the death of respondent's husband and children. There has just been published another decision by the Florida Supreme Court in which it was held that the mere fact that the driver of the automobile did not stop or take such precautions for his safety as are reasonably required under the circumstances would not bar a recovery where it also appears from the evidence that the railroad company was also negligent. This was the case of *Anderson* v.

Crawford, et al., 149 So. 656 (Advance Sheet No. 10, published October 19, 1933), wherein the court said:

> "While it is true that the plaintiff may not recover from a railroad corporation damages for personal injuries sustained while attempting to cross the track of the railroad at a public crossing in front of an approaching train when he knew, or could have known by the exercise of reasonable caution, of the approach of the train and the imminent danger to which he voluntarily subjects himself by attempting to cross the track in front of it, yet, if the plaintiff's negligence was not the sole proximate cause of the injury, or if the evidence is not so clear as to be apparent that he was the sole cause of his own injury, but only amounted to contributory negligence, and the injury might have been avoided but for the negligence of the railroad corporation, he may nevertheless recover damages for his injury, but they will be reduced in proportion to the contributory negligence of the injured party. (4) We reiterate what this court has often said relating to the reciprocal duties of railroad train operatives and a person travelling upon the public highway who desires to cross a railroad track. The conditions existing at the crossing at the time of the accident constitute the measure of duty resting upon the train operatives on the one hand and the traveller upon the public highway on the other. * * * The speed at which the train was operated is one circumstance; that such speed was in excess of the limitations placed by a valid ordinance upon the speed at which trains should be operated at certain places was another circumstance tending to show the carelessness and disregard of life on the part of the train operatives in handling the train. While it is true that, if the plaintiff saw the approaching train, or by the exercise of due care could have seen it as it approached, but in careless disregard of his own life drove his automobile upon the track in front of the train, he should not be allowed to recover damages for injuries sustained, yet that was a matter

to be determined by the jury, and the circumstances of this case as they existed at the crossing at the time of the accident are not so perfectly and convincingly evident of plaintiff's carelessness and disregard of his own welfare as to have warranted the court in taking the question from the jury and deciding that the defendant was free from any liability."

It is true that it does not appear from the record in this case that there was a valid ordinance in the City of Dunedin limiting the speed of trains at the point where the accident occurred, yet the Florida Supreme Court in the *Foxworth* case, which has been affirmed time and time again, laid down the rule:

> "A railroad company operating its trains along or across the streets of a town or city, must use greater care than in less frequented localities, and any neglect of any precaution proper in the peculiar circumstances of the locality constitutes negligence."
>
> *Fla. Cent. & P. R. Co.* v. *Foxworth*, 41 Fla. 1, 25 So. 338.

If *any* neglect of *any* precaution proper in the peculiar circumstances of the locality constitutes negligence, and viewing conflicts in the evidence in the light most favorable to respondent and accepting as established all the essential facts which respondent's evidence, if not contradicted, would fairly prove to be true, we must come quickly to the conclusion that the engineer did not signal with whistle or bell and was running the train at a high and dangerous rate of speed through a thickly settled community, over a much-travelled street where the view was obstructed and in the face of a strong head wind which obstructed the sound of an approaching train from the south, thereby showing or tending to show a carelessness and disregard of life on the part of the train operatives in handling the train. Consequently the railroad company was palpably

negligent, and that such negligence was *a* proximate cause of the collision cannot be doubted. We therefore submit that it might well be said on this record that negligence of respondent's husband, operating contemporaneously with that of petitioner, *together* constitute the efficient proximate cause of the injuries inflicted, without either one of which the harm would not have been done. While a person about to cross a railroad track must use *reasonable* caution, he is not required to be *infallible—only careful.*

> "While the *Goodman* case extends the doctrine of contributory negligence, as applied to crossing accidents, to an extreme limit, it does not go to the extent of holding that there can be no recovery in any case where the injured party does not stop to look and listen for an approaching train before going upon the track."
>
> *Weinstein* v. *Powell,* 61 Fed. (2) 411.

Conclusion.

In conclusion, respondent submits a quotation from the *Claughton* case, referred to by Mr. Justice Hutcheson in his separate dissenting opinion (R. 98), as correctly announcing and applying the rule applicable to both this case and case No. 71:

> "Under the second above set out statute, the burden of proving the alleged injury or death is on the plaintiff, and the burden of showing the absence of negligence is on the defendant. Under the last above set out provision, if the deceased and the agents of the defendant were both at fault, the plaintiff was entitled to recover, but the amount of damages is required to be diminished in proportion to the contributory negligence of the deceased. *Atlantic Coast Line R. Co.* v. *Weir,* 63 Fla. 69, 58 So. 641, 41 L. R. A. (NS) 307, Ann. Cas. 1914A, 126; *Atlantic Coast Line R. Co.* v. *Watkins,* 97 Fla. 350, 121 So. 95; *Germak* v. *Florida*

East Coast Ry. Co., 95 Fla. 991, 117 So. 391; *Florida East Coast Ry. Co.* v. *Nance*, 96 Fla. 171, 117 So. 842. There was evidence tending to prove that the deceased was negligent in failing to have his car under control as it approached the railroad crossing and to look out for an approaching train before going on or in dangerous proximity to the crossing; and that the appellee's agents in charge of the operation of its train were negligent in running it at a speed which was excessive and dangerous, where the railroad track crossed a much-travelled highway or street in a town, in not blowing the whistle or ringing the bell of the engine to give timely warning to inattentive persons travelling on the street or highway crossed, and in not having the engine so under control that the train could not be stopped before reaching the crossing. It is quite plain that the record does not show that absence of negligence chargeable against the appellee was proved by undisputed evidence. A state of facts which evidence tended to prove was such that appellant was entitled to recover, though the damages were subject to be diminished in proportion to contributory negligence of the deceased. It follows that the above-mentioned rule was erroneous. Because of that error, the judgment is reversed, and the cause is remanded, with direction that a new trial be granted."

Claughton v. *A. C. L. R. R. Co.*, 47 Fed. (2) 679, 680.

Respondent therefore submits that the action of the circuit court of appeals in reversing the cases involved in this petition, No. 95, and remanding them to the trial court to be submitted to a jury, should be affirmed.

Respectfully submitted,

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